authority, intimates that this proposition is "fairly debatable."[12] Inasmuch as the injunction point was determinative of the case, it would seem preferable to have avoided any statement in derogation of the apparently well-settled rule as to res adjudicata.

C. C. H.

MINING LAW: RELOCATION BY ORIGINAL LOCATOR FOLLOWING HIS FAILURE TO PERFORM ANNUAL LABOR—In *Rohn v. Iron Chief Mining Company*[1] the Supreme Court held that the locator of a mining claim who has not done any of the development work required by the Federal statutes[2] during the calendar year following the date of his location could nevertheless immediately at the beginning of the next year relocate the same claim and obtain title thereto under such relocation. The court followed what it held to be the weight of precedent.[3] The court also cited cases where relocations by the original locator, or one of several locators, have been recognized.[4]

The court considered Judge Lindley's criticism[5] that to allow the original locator to relocate, after failing to perform the annual labor required by the Federal statute, would be in direct violation of the spirit and intent of the statute, enabling him to take advantage of his own dereliction, but refused to follow Judge Lindley's conclusion for the reason that the statute expressly provides that upon failure to perform the annual labor the mining claim "shall be open to relocation as if no location of the same had ever been made. . . ." The court held that no limitation could be placed on this language, which would include the original locator within its scope, as well as third parties. The court's conclusion also seems to be partially based upon the statement that the "main purpose" of

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[12] Supra, n. 4, p. 751.

[1] (Aug. 24, 1921) 62 Cal. Dec. 230, 200 Pac. 644.

[2] § 2324 U. S. Rev. Stats., 3976 Barnes' Fed. Code, Act of Jan. 22, 1880, 21 U. S. Stats. at L., 6 Fed. Stats. Ann. 2nd ed. 533, U. S. Comp. Stats. § 4620.

[3] Warnock v. DeWitt (1895) 11 Utah 324, 40 Pac. 205; Legoe v. Chicago Fishing Co. (1901) 24 Wash. 175, 64 Pac. 141.

[4] Conway v. Hart (1900) 129 Cal. 480, 62 Pac. 44; McCann v. McMillan (1900) 129 Cal. 350, 62 Pac. 31; Strang v. Ryan (1873) 46 Cal. 34; Thompson v. Spray (1887) 72 Cal. 528, 14 Pac. 182; Richards v. Wolfing (1893) 98 Cal. 195, 32 Pac. 971; Lockhart v. Johnson (1900) 181 U. S. 510, 45 L. Ed. 979, 21 Sup. Ct. Rep. 665; Hunt v. Patchen (1888) 13 Sawyer, 304, 35 Fed. 816; Leedy v. Lehfeldt (1908) 162 Fed. 304, 89 C. C. A. 184; Saunders v. Mackey (1885) 5 Mont. 523, 6 Pac. 361. However, none of these cases presented the problem where the original locator was relocating to escape the performance of assessment work, and rights of third parties locating adversely were not involved. Relocation by a relative after failure to do assessment work and conveyance to original locator held lawful. Perley v. Goar (1921) 195 Pac. 532 (Ariz.).

[5] Lindley on Mines § 405. Other leading text-writers on the subject of mining law agree with Judge Lindley—Costigan on Mining Law, pp. 327, 331; Morrison's Mining Rights, 15th ed., p. 154. See also Emerson v. Akin (1914) 26 Colo. App. 40, 140 Pac. 481, 482.

the annual labor requirement in the statute "obviously was to compel the locator to do some work on the premises . . . so as to leave visible evidence of his claim for the information of other prospectors, to enable them to avoid taking up the same ground."[6]

Many will not agree with this statement of the court, for if this were the "main purpose" of the statute, the object of warning other prospectors from taking the same ground could have been better accomplished by requiring the original locator merely to post a written notice on the claim each year, to the effect that he intended to hold the same. Annual labor may be performed at some distance from a claim on other claims of a group[7] or even entirely off from a group of claims,[8] such as for the purpose of bringing water to the claims or building a road to the claims.[9] Diamond drill holes, which leave no observable evidence to other prospectors, have also been held to be satisfactory improvements.[10] It is difficult to reconcile work of this character with the statement of the court just quoted. The authorities are quite unanimous in holding that the real purpose of the law is to exact work as evidence of good faith on the part of the owner, to discourage the holding of mining claims without development, to the exclusion of others who could and would improve such ground if opportunity was afforded, and to prevent the accumulation of possessory titles to great areas of land, thus retarding the progress and development of the mining industry.[11]

The fact that the character of the work must be such as will "facilitate the extraction or removal of ore from the ground,"[12] as all the authorities hold, is proof that it is intended to promote "the development or production of precious metals" or other mineral, and not for the "main purpose" of notifying other prospectors that the ground is already claimed.

Following this principle, quartz mills, even though erected on the claim, are not regarded as satisfying the requirements of the statute,[13] and yet they serve to notify other prospectors that the ground is claimed.

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[6] Supra, n. 1, at p. 232.

[7] Smelting Co. v. Kemp (1881) 104 U. S. 636, 655, 26 L. Ed. 875; Chambers v. Harrington (1883) 111 U. S. 350, 354.

[8] Smelting Co. v. Kemp (1881) 104 U. S. 636, 655, 26 L. Ed. 875; Big Three Mining & Milling Co. v. Hamilton (1909) 157 Cal. 130, 107 Pac. 361.

[9] Sexton v. Washington Mining & Milling Co. (1909) 55 Wash. 380, 384, 104 Pac. 614; Doherty v. Morris (1891) 17 Colo. 105, 28 Pac. 85.

[10] In re McCormick (1912) 40 L. D. 498; East Tintic Consolidated Mining Co. (1914) 43 L. D. 79.

[11] Chambers v. Harrington (1883) 111 U. S. 350, 353, 28 L. Ed. 452, 4 Sup. Ct. Rep. 428; Wailes v. Davies (1907) 158 Fed. 667, 672; Jupiter Mining Co. v. Bodie Consolidated Mining Co. (1881) 11 Fed. 666; Book v. Justice Mining Co. (1893) 58 Fed. 106.

[12] Smelting Co. v. Kemp (1881) 104 U. S. 636, 655, 26 L. Ed. 875; McCulloch v. Murphy (1903) 125 Fed. 147, 149.

[13] Golden Giant Mining Co. v. Hill (1921) 198 Pac. 276 (N. M.); Monster Lode (1907) 35 L. D. 493; Highland Marie Lodes (1901) 31 L. D. 37; Schrim-Carey Placers (1908) 37 L. D. 371.

The fact that section 2324 provides that the ground shall be open to relocation upon the failure to perform assessment work "provided that the original locators . . . have not resumed work," would seem to lend considerable support to the argument advanced by the leading text-writers that it was not intended that these original locators should be permitted to take advantage of their own default, and that by necessary implication they are excluded from violating the real spirit of the annual labor requirement.

The original locators occupy a different status from that of third parties, for they still have title to their locations and in order to relocate they must necessarily terminate the old title before they can relocate and initiate a new one. Can they lawfully abandon this title for the purpose of evading the statute?

As a result of the interpretation placed on the law in this case, the following situation would seem to be a logical consequence:

Under section 2324 the original locator may resume work on the last day of the year within which he is required by law to perform his work[14] and thus prevent rival locators from relocating his ground during the afternoon of July 1. By stopping this resumption of work when there are no rivals in the vicinity, his claim becomes automatically open to relocation. He may then take advantage of the ruling of the Supreme Court of California and relocate the ground himself. In other words, this interpretation of the law permits him to abandon his former title in his own favor.

Mere failure to perform annual labor, except in Alaska, does not automatically extinguish the locator's title.[15] Therefore, to make a relocation, the locator must necessarily abandon the title created by his original location. On this question of the right of a locator to abandon in his own favor and relocate the abandoned area, see Emerson v. Akin,[16] where the court says: "If the owner of a claim abandons any part of it from any improper motive, such, for instance, as to escape the annual assessment, and thereby projecting, or attempting to project, his rights one year into the future without doing his annual assessment work, then it might well be that such abandonment would be held to have been promoted by ulterior motives, and therefore void."

If the court's ruling in the leading case is to be upheld, there is, as suggested, no legal method of preventing a locator under these circumstances from each year performing a few hours work at the outside, then ceasing this resumption and taking advantage of his own delinquency by relocating. He may continue to do this year after year. The situation which is thereby created certainly defeats and nullifies the real object of the statute. The question

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[14] The law has recently been changed so that the year for performing annual labor in the future "shall commence at twelve o'clock meridian on the 1st day of July." Public No. 64, 67th Congress, approved Aug. 24, 1921.

[15] Lindley on Mines, § 651.

[16] (1914) 26 Colo. App. 40, 140 Pac. 481, 482.

will not be finally set at rest until it has been passed upon by the Supreme Court of the United States.[17]

W. E. C.

Recent Decisions

CONFLICT OF LAWS: WHAT CONSTITUTES RESIDENCE FOR THE PURPOSE OF THE INHERITANCE TAX—A testator for ten years preceding his death spent one-half of each year at his home in California and the other at his home in Wisconsin. Upon his death suit was brought to collect an inheritance tax in this state, the complaint alleging that, at the time of his death, the deceased was a resident of California. *Held:* that a person can have but one residence and under the facts stated the deceased's intention would determine whether it would be in Wisconsin or California. The court then found the residence to be Wisconsin. *Chambers v. Hathaway* (1921) 62 Cal. Dec. 368, 200 Pac. 931.

The court considered the rules for determining residence as laid down in section 52 of the Political Code to be controlling in this case. This raises an interesting question of whether or not section 52 was intended to cover residence for the purpose of civil as well as political rights. Our political code was modeled after the Draft Political Code of New York (submitted to the New York Legislature, April 10, 1860). But whereas section 7 of the Draft Code gives the rules for domicile, the corresponding section of our code (section 52) gives the same rules but substitutes the term "residence" for "domicile" and does not define residence or mention domicile. Query, if the authors of the code did not intend to leave all questions of domicile to the common law? However, as at common law no person can at the same time have more than one domicile, and as a change of domicile is effected only by an act plus an intent, the decision would have been the same had the court held that section 52 did not apply. Abington v. North Bridgewater (1840) 28 Pick. (Mass.) 170; See also 35 Harvard Law Review, 189; 34 Harvard Law Review, 52.

CONFLICT OF LAWS: WHAT LAW GOVERNS COVENANTS FOR TITLE—The decision of the Supreme Court in *Platner v. Vincent* (1921) 62 Cal. Dec. 589, reverses the decision of the District Court of Appeal (33 Cal. App. Dec. 407) criticized in this REVIEW (9 California Law Review, 234, 460). The decision

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[17] Cal. Civ. Code, § 1426s, which prohibits a locator from relocating within three years of the date of the original location, was not considered, presumably, as the record discloses, because the relocations in question were made prior to the year 1909 when this provision became effective. Montana, by state legislation, inhibits such relocations altogether, Rev. Code 1907, § 2289. Validity of statute upheld. Lehman v. Sutter (1921) 198 Pac. 1100, 1103 (Mont.). This legislation has been criticised as being in conflict with the Federal law. Lindley on Mines, § 405. However, if the interpretations placed on 2324 U. S. Rev. Stats. by the principal case is to control, some such remedial legislation is eminently desirable.